No. 86-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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OVERVIEW

Part of the answer to Respondents' argument to the Court--that this petition "raises no new, interesting, or controversial legal issues and presents no special or important reason" justifying review (R. Br., p. 9)--appears in, and Petitioner asks the Court to take judicial notice of, a recent article, "Chicago Courts Reel From Corruption Probe," in the *National Law Journal* (March 2, 1987).

The feature reported a "long, hard look at itself" being made by Chicago's legal profession in the wake of the state court judicial scandal known as Operation Greylord. Identified among the problems which are compromising the courts are *ex parte* communications between lawyers and judges, and the unwillingness of lawyers to come forward about wrongdoing, for fear of reprisals.

Greylord may be an extreme example of misconduct in the courts, but unfortunately it is not alone across the nation, and the article cites a realization that "it could have taken

place anywhere." The article emphasizes that the future integrity of the judicial system requires enforcing high ethical standards and confronting impropriety when it occurs--instead of looking the other way and remaining silent. These points, applied to this case, answer Respondents' arguments by presenting strong reasons why Certiorari should be granted.

First, it both defiles the very essence of the federal courts as a neutral and detached forum, and renders Petitioner's Due Process right to an impartial judge a sham, for Respondents' attorneys to have had an undisclosed, private, and ongoing line of communication about this pending lawsuit with Judge Warren/his assistant(s) as Wisconsin Attorney General prior to Warren's judicial appointment and assignment to this case. (The key exhibit, Pl. Exh. #B-1, documenting this extraordinary extrajudicial relationship, is discussed, *infra* at pp. 10-16) Under these circumstances, as a matter of law, Petitioner

did not come before Judge Warren on equal standing with Respondents[1], and "Equal Justice Under Law" has been supplanted here by an Orwellian concept that "all...are equal, but some...are more equal than others."

To allow this practice to be sanctioned, as the Seventh Circuit has done, is to send a dangerous message at the wrong time as to the level of ethical conduct that will be permitted in federal courts.

DENIAL OF PETITIONER'S FIRST AMENDMENT RIGHTS

Second, regarding the article's description of the reluctance of lawyers to come forward about judicial improprieties, sanctions such as the Seventh Circuit has imposed upon Petitioner, if permitted to stand, will have a chilling effect upon others encountering ethical improprieties.

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[1]as should be proscribed, Petitioner submits, by the Court's prohibited "possible temptation (petition, pp. 25-26), and is absolutely barred under the consultative "of counsel" prohibition of (pre-1974) 28 U.S.C. § 455 (petition, n. 9, pp. 28-29).

Had Petitioner engaged in "baseless litigation," Respondents' contention would be correct that he would not be subject to First Amendment protection. (R. Br., p. 20) But that is not what happened here. Petitioner was entitled to a review of the evidence, the issues, and of the applicable law he presented in good faith to that Court. This he did not receive. As detailed in the petition (pp. 16-19; *infra*, pp. 11-14), the Seventh Circuit instead omitted and changed the centralities of Petitioner's appeal so that it lost its significance, and then penalized Petitioner $2,500 for what *it* had transformed into a "frivolous" appeal. Instead of confronting the sensitive issues raised before it, alleging a colleague's impropriety, that Court penalized Petitioner for raising them.

This Court has held that "the government is prohibited from infringing upon...(the First Amendment guarantees of petition and free speech)...by imposing sanctions for the

expression of particular views it opposes." (*Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464 [1979]) Yet, a form of that, in essence, is what the Seventh Circuit has done and thereby raises a question to this Court with significant Constitutional and public policy implications:

Do the First Amendment rights "to petition the government for a redress of grievances" and free speech exclude protection of good faith criticism of federal judicial impropriety?

NEED FOR DISCLOSURE REQUIREMENT BY THE COURT

Third, an essential element of assuring ethical compliance is that of full disclosure, and Respondents' brief further demonstrates the need for the Court to extend to all federal court proceedings the requirement of "frankness at the outset" that it imposed regarding disqualification requirements for federal arbitrators. (*Commonwealth Coatings Corp. v.*

Continental Casualty Co., 393 U.S. 145 [1968])[2]

Respondents assert that Petitioner "is unwilling to accept the finality of the judgment entered against him eleven years ago." (R. Br., p. 21) But, what is telling is the absence of any claim on their part that they previously had disclosed or that Petitioner had any prior knowledge during those earlier proceedings of the newly discovered extrajudicial "maintaining communication" relationship. For Respondents' counsel--and Judge Warren--not to have made such disclosure when Petitioner had raised the issue of Judge Warren's disqualification during each of the previous two sets of proceedings, prejudiced those proceedings. Beyond this, for Respondents' attorney, James P. Brody, to have vigorously and successfully opposed both the

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[2]In arguing that adequate safeguards for disclosure already exist (R. Br., p. 18), Respondents neither mention nor respond to the problem of the series of "non-disclosure" cases detailed in the petition. (n. 6, pp. 20-21)

assignment of an outside judge to hear Petitioner's R. 60 (b) (6) motion and any hearing into the improprieties alleged, involving Judge Warren and Brody in this case--while Brody simultaneously was the lawyer of record defending Judge Warren against alleged wrongdoing, in another lawsuit pending in the same court--contravenes the appearance of high ethical standards in the federal courts and smacks of a "good 'ol boy" relationship at work. (petition, pp. 13-14) Brody asks the Court to accept such matters as "of no interest to any one other than the litigants." (R. Br., p. 9) But, to the contrary and that they taint the federal courts and the judicial process, see, e.g., "Margoles case confronts Seventh Circuit with 'actual improprieties.'" (Rob Warden, *Chicago Lawyer*, December, 1985)[3]

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[3]Respondents attempt to cloud the significance of these non-disclosures by misrepresenting the impact of several points of law upon this case, e.g.:

1) Wisconsin's New Open Records Law: They suggest that the preceding Open Records Law

similarly would have allowed Petitioner previous access to the newly produced documents. (R. Br., n. 6 at p. 7) In fact, Petitioner had made a number of such previous requests and had obtained a 1974 discovery order in the first slander case--which covered these matters--but for whatever reason, it was not until 1983 and under the new law that Atty. Gen. Warren's successor produced some of what the Warren administration previously had withheld. (e.g., par. 29, R. 60 [b][6] motion)

2) The One-Disqualification Motion Limit: Respondents would have the Court believe that Petitioner could have avoided the controversy over Judge Warren by having brought a *second* disqualification motion in this case, against him. None of the cases they cite (R. Br., n. 3 at pp. 3-4) permitted a party to file a second disqualification motion in the same case. To the contrary, every reported federal case on this issue has forbidden such attempts. (See authorities cited in n. 2 at pg. 11, Pl. R. Br. in the Seventh Circuit Court of Appeals. It also was the subject of Plaintiff's "Post-Oral Argument Supplemental Brief" to that Court, containing additional authority on the one-motion limit.)

3) Writ of Mandamus: Respondents use holdings from other circuits to say Petitioner had and did not exercise the right in 1975 to seek a writ of mandamus to disqualify Judge Warren. However, in 1975, the Seventh Circuit followed a "minority view" barring such writs, and changed that position two years later in a "case of first impression" under the newly amended 28 U.S.C. § 455 (which was not applicable to this case, n. 2 at A-4; *SCA Services, Inc. v. Morgan*, 557 F. 2d 110, 112, 117).

A result of these repeated non-disclosures--which cannot be emphasized too strongly in view of Respondents' claim that "as demonstrated by the record" (e.g., R. Br., p. 16) Petitioner's showing is inadequate--is that ***the record now before the Court is <u>not the totality</u> of the extrajudicial communications or of Judge Warren's role in them--it is <u>all</u> that Petitioner is permitted to see in the face of an assertion of lawyer-client privilege by the Attorney General's office and Respondents' successful blocking of the evidentiary hearings sought in Petitioner's 1980 R. 60 (b) (4) and present R. 60 (b) (6) motions so that full discovery could be made.*** Respondents misstate this situation to the Court, e.g.,

> "Most important, there is not a sliver of evidence that Judge Warren personally knew of any of these matters." (R. Br., p. 15)

It is not that such evidence does not exist, but that Petitioner is denied access to

the very files bearing on Judge Warren's knowledge. From this distinction arises the applicability to Judge Warren of the presumption of "shared knowledge" within his former office,[4] and further demonstration of the need for this Court to prohibit "gamesmanship" in lieu of full disclosure affecting judicial disqualification.

THE KEY EXHIBIT (PL. EXH. #B-1): "MAINTAINING COMMUNICATION"

NOTE: PETITIONER ASKS WHOEVER REVIEWS THIS CASE TO EXAMINE--IF NOTHING ELSE--WHAT FOLLOWS, BECAUSE THE EXTRAORDINARY SUBSTANCE AND CONTEXT OF PL. EXH. #B-1 MOST STRIKINGLY CONVEY THE MERITS OF THIS PETITION.

In contending to the Court that it should

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[4]Inclusion among Petitioner's exhibits of detailed documentation of Atty. Gen. Warren's repeated personal involvement and knowledge concerning the several other Margoles cases in his office, was for the purpose of establishing the applicability to Judge Warren in this case of the presumption of "shared knowledge." (petition, n. 4 at p. 13; n. 8 at p. 27) This also belies the blinders donned by the lower courts and the "Chinese Wall" Respondents' Attorney Brody has been attempting to construct around Judge Warren (e.g., R. Br., p. 15; cf: petition, n. 3 at p. 4)

not hear this case, Respondents draw several quotations from the Seventh Circuit's decision in which it stated that,

> "(I)t had 'thoroughly examined the documents underlying the plaintiff's motion' and...determined Petitioner's 'evidence' to be 'either totally inconclusive' or 'patently innocuous' (A-19) and 'woefully inadequate to warrant relief under Rule 60 (b) (6).' (A-11)" (R. Br., p. 9; also see p. 17)

The problem with these statements is that *nowhere* in the decision--throughout which that Court stated the reasons upon which it based these conclusions--did it mention Pl. Exh. #B-1 which lies at the heart of and gives the present R. 60 (b) (6) motion its significance.

Pl. Exh. #B-1 is an internal memorandum from the Wisconsin Attorney General's office. Dated March 3, 1975, it enumerated some of a staff attorney's activities over the previous four-and-a-half years (during the Warren administration) in assisting Attorney General Warren's defense against Petitioner's then-pending, first defamation (and Civil Rights) lawsuit (petition, pp. 3-4)--including:

"...MAINTAINING COMMUNICATION WITH ATTORNEYS FOR THE MILWAUKEE JOURNAL COMPANY, WHICH IS DEFENDING A SIMILAR SUIT BROUGHT BY DR. MARGOLES IN U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN."
(Pl. Exh. #B-1; emphasis added)

The two key words in this internal memo which create the extraordinary Constitutional and ethical issues now before this Court are **"MAINTAINING COMMUNICATION."**[5] The plain and unambiguous meaning of ***"maintaining"*** as "continuing" or "ongoing"--taken together with the application to Atty. Gen. Warren of the presumption of shared knowledge (*supra* at p. 10)--brought this extrajudicial relationship and Judge Warren within the absolute, consultative "of counsel" prohibition of the (pre-1974) 28 U.S.C. § 455 applicable to this case (petition, n. 9 at pp. 28-29, p. 12). As well, Petitioner submits, they come within a special category of conduct or relationships for which the Court, on a case-by-case basis,

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[5]Inadvertently, the gerund "maintaining" erroneously was typed as the verb "maintained" in the petition.

has required *per se* judicial recusal because of what it proscribes as the "possible temptation." (petition, pp. 25-26)

Neither the "possible temptation" prohibition nor the "shared knowledge" presumption appears anywhere in the Seventh Circuit's decision. The "of counsel" disqualification requirement was not analyzed--only mentioned as being dismissed as "groundless." (A-11)

So, too, does Respondents' brief avoid addressing the "consultative" aspect of the § 455 "of counsel" ban or the "shared knowledge" presumption. It brushes past the "possible temptation" rule with a misstatement of what the Court has held in those cases. (R. Br., p. 15; cf: petition, p. 26) Instead, it says that the Seventh Circuit did apply the bias in-fact standard. (R. Br., p. 11) This assertion lacks a citation to the decision, because the only--and a blanket statement in the opinion as to the applicable standard of proof here for

disqualification--was that Court's blatantly erroneous assertion, i.e.,

"The plaintiff maintains that the proper threshold of proof would be that of an appearance of partiality." (n. 11 at A-11; cf: petition, n. 5.b. at pp. 17-18)

Where the Seventh Circuit entirely avoided Pl. Exh. #B-1, Respondents attempt to excuse the extrajudicial "maintaining communication" as "innocuous." (R. Br., p. 14)[6] Such efforts are precluded by

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[6] **CONTEXT OF "MAINTAINING COMMUNICATION":** Respondents fail to include several relevant facts which provide the context for, and refute their attempted trivializing of the "maintaining communication," e.g., they would have the Court believe Petitioner's two slander cases (about which Atty. Gen. Warren's office and defense counsel were communicating) were very "different" cases involving "a wide range of different issues..." (R. Br., n. 5 at pp. 5-6) What they do not say is that a primary issue dominant in both cases was Petitioner's complaint that the defendants respectively had slandered him by accusing him of having committed what were then illegal abortions (See the respective complaints: Pl. Exh. #1 [this case, count I - par. 7.a. at p. 2; count II-par. 7 at p. 3; count III - par. 7.a. and b. at p. 4] and Pl. Exh. #2 [the first defamation case which Atty. Gen. Warren was defending: count I - par. #12 at pp. 5-6; count III - par. 22 and 23 at p. 10].) Indeed, the internal memo from the Attorney General's office speaks of this case being "a similar suit" to the one

it was defending. (Pl. Exh. #B-1)

Moreover, Respondents do not tell the Court that their answer in this case included an affirmative defense of truth. (answer, par. 34 at p. 5) Under these circumstances, it does not ring true for Respondents' attorneys to ask the Court to believe that the communications consisted only of several letters in February-March, 1974, in conjunction with Atty. Gen. Warren's office forwarding essentially part of the court record in the first defamation case. (R. Br., p. 14) Because "a counselor at law is enjoined to probe deeply for all the facts, favorable and unfavorable, before counseling a particular course for his client" (*Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380, 385, 8th Cir. [1979]), it defies credibility that Respondents' attorneys would have asked merely for the "public record" (R. Br., p. 14) in the first defamation case, and would not have taken the fullest possible advantage of the extensive files and persons in the Attorney General's office simultaneously defending state medical board officials against the ***same*** defamation issue brought by the ***same*** plaintiff. After all, Atty. Gen. Warren/his office were the source likely to have information Respondents' attorneys were seeking to prepare their defense in this case!

It is apparent on the face of the first letter (Pl. Exh. #B-5, dated February 4, 1974 in which public documents were mailed to Respondents' counsel) that this was in response to *prior* communication between the two offices. This is consistent with the unrebutted statement of the staff attorney subsequently defending the first defamation case, to Petitioner's counsel, that the Attorney General's office and Respondents' attorneys, in fact, were exchanging information and cooperating with each other in the two slander

transcending Constitutional and ethical concerns which require *per se* disqualification because of the conduct or relationship itself--without the need to show actual prejudice on the part of the judge. As expressed in another of the Seventh Circuit "non-disclosure" cases:

"The vice of *ex parte* communications is well illustrated by this case. It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations. This is why the prohibition is not against 'prejudicial' *ex parte* communications, but against *ex parte* communications." (*In Re Wisconsin Steel Corp.*, 48 B.R. 753, 760, N.D.Ill.E.D. [1985]; also, *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446, 6th Cir. [1980]; see petition, n. 6 at p. 21)

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cases. (R. 60 [b] [6] motion, par. 26 at p. 14, as sworn to by the accompanying affidavit of Petitioner's counsel, dated January 3, 1984)

Indeed, the crux of Pl. Exh. #B-1 was that Atty. Gen. Warren's assistant was "maintaining communication" with Respondents' attorneys to gain information for the defense of the first defamation case. But, that office has asserted lawyer-client privilege against Petitioner seeing any such communications from its "trial file." (petition, pp. 11-12)

STANDARDS OF REVIEW

Respondents cite as the standard of review for a R. 60 (b) (6) motion, that "no reasonable person could agree with the district court's decision." (R. Br., p. 12) Applying that criterion here, no reasonable person would accept as a matter of fundamental Due Process a judge presiding over a case where the judge/his assistants previously had been "maintaining communication" about the case with a party's opponent. And no reasonable person would find tolerable the repeated failures to disclose this extrajudicial relationship.

An equally applicable and perhaps more appropriate standard for review here is that enunciated by the Fifth Circuit:

> "This court, moreover, through the exercise of our supervisory powers, can prohibit any practice which threatens the judicial process and its integrity. (*U.S. v. Columbia Broadcasting System, Inc.*. 497 F.2d 107, 109-110, 5th Cir. [1974])...An appellate court always has the inherent power to promote Justice by holding improper a trial judge's failure to disqualify himself. (*Texaco, Inc.*,

v. Chandler, 354 F.2d 665, 10th Cir. [1965])"

(*Fredonia Broadcasting Corporation, Inc. v. RCA Corporation*, 569 F.2d 251, 256-257, 5th Cir. [1978])

Respectfully submitted,

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